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COURT OF CRIMINAL APPEALS
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In The Court Of Criminal Appeals
Austin, Texas

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COURT OF CRIMINAL APPEALS
10/21/2020
DEANA WILLIAMSON, CLERK

STATE OF TEXAS

Appellee

vs.

APRIL WILLIAMS,

Appellant

On Appeal From the Fourth Court of Appeals
San Antonio, Texas
Trial Court Cause No. 18-0874-CR-B
Court of Appeals Cause No. 04-18-00883-CR

APPELLEE'S BRIEF

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Trial Judge:

Hon. Jessica Crawford
2nd 25th District Court
Guadalupe County, Texas

Fourth Court of Appeals Panel:

Sandee Bryan Marion, Chief Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument has been denied by this Court.

ISSUES PRESENTED

ISSUE 1

The Court of Appeals's approach to the right to a public trial is excessively rigid and leads to absurd results. This Court should adopt the federal triviality doctrine and apply it to the facts of this case. Under that doctrine, Jerry Williams's exclusion from the courtroom was too trivial to amount to a violation of the Sixth Amendment.

ISSUE 2

Jerry Williams's exclusion did not constitute a closure or the courtroom because the live feed allowed him to see and view the informant's testimony at the time it was given and, thus, see and hear it just as if he had been inside the courtroom when the informant testified.

ISSUE 3

Partial closures do not raise the same constitutional concerns as full closures because people remain in the courtroom to protect the right to a public trial and this Court should formally recognize that distinction. The closure in this case constituted a partial closure and was supported by a substantial basis.

STATEMENT OF THE CASE

Appellant was charged with one count of manufacture or delivery of a controlled substance penalty group one in an amount equal to or greater than four grams but less than two hundred grams. (Clerk's Record ("CR"), pg. 3). A jury found her guilty and she was sentenced by the trial court to twenty (20) years confinement. Id. at pg. 53, 68. Appellant appealed her conviction to the Fourth Court of Appeals. *Williams v. State*, 2020 Tex. App. Lexis 3982, pg. 1-9, 2020 WL 2543308 (Tex. App.—San Antonio 2020, pet. granted). The Court of Appeals reversed her conviction and ordered a new trial. *Id.* at 9. Appellee filed a petition for discretionary review to this Court. That petition was granted.

STATEMENT OF THE FACTS

A. Circumstances Surrounding the Offense

On August 4th, 2016, Detective Jaime Diaz of the Seguin Police Department met with a confidential informant for the purpose of conducting a controlled buy from appellant. (Reporter's Record ("RR") Vol. 2, pg. 177, 188-89). In preparation for the buy, Diaz searched the informant for drugs and money, provided him with money, and gave him two recording devices (a key fob and sunglasses). (RR Vol. 2, pg. 189-90; RR Vol. 3, pg. 13).[1]

The informant had previously met appellant through an associate he described as "family" and had purchased drugs from her in the past. (RR Vol. 3, pg. 12). After obtaining the recording devices from Diaz, the informant called appellant to arrange the purchase of seven grams of cocaine. Id. at 16-17. They agreed to conduct the buy at the informant's residence. Id. at 18. Appellant eventually entered the house, removed the cocaine from a black bag, broke it into pieces, weighed it, and gave it to the informant. (RR Vol. 3, pg. 19-21, 23-24; State's Exhibit #1). The informant then gave her $180 for the drugs. (RR Vol. 3, pg. 20; State's Exhibit #1).

After appellant left the residence, the informant gave the drugs he purchased from her to Diaz. (RR Vol. 2, pg. 192; RR Vol. 3, pg. 21). Diaz field tested the drugs, which tested positive for cocaine. (RR Vol. 3, pg. 40). Id. The drugs were placed into evidence and sent to the DPS crime lab for testing. (RR Vol. 2, pg. 194-195; RR Vol. 3, pg. 46).

[1] The sunglasses successfully and accurately recorded the transaction, but the key fob did not work properly. (RR Vol. 2, pg. 190-92; State's Exhibit #1).

The lab confirmed that the drugs were cocaine and found that they weighed 4.7 grams.[2] Id. at 48.

B. Exclusion of Jerry Williams from the Courtroom

Prior to the informant's testimony, the State approached the trial court and requested that Jerry Williams be excluded from the courtroom "in the interest of not intimidating our witness to testify." (RR Vol. 3, pg. 5). The prosecutor stated that Jerry Williams should be excluded "because we have credible and reliable information that it would be very intimidating to our witness for him to be in the courtroom to testify." Id. In order to accommodate both its witness and Jerry Williams, the State created a live video stream using Skype, which allowed him to view the testimony from another room. Id. at 5-7.

Respondent objected on the grounds that the State had not provided evidence regarding its claim and that removing Jerry Williams allowed the confidential informant to testify in a consequence free environment. *Id.* at 5-6. The State responded by stating that:

> Your, Honor, the only person who has a right to confrontation is April Williams. April Williams will be sitting at that table. We are not saying Jerry Williams cannot watch this person testify; however, the only reason he would sitting in this courtroom is to intimidate a confidential informant. I was the former drug and gang interdiction prosecutor, I have prosecuted capital murder cases where confidential informants were killed and/or intimidated during the course of their testimony and I think there's zero reason behind – behind keeping him in the courtroom. We're not violating open court if we let him watch by Skype from another courtroom.

[2] The field weight for the drugs was 7.1 grams (including packaging). (RR Vol. 3, pg. 37, 40). The chemist stated that the reason there was a difference between the field weight and the weight they obtained in the lab was because the moisture in the crack cocaine (which is made damp) evaporated prior to testing. Id. at 49.

Id. at 6-7. The trial court granted the State's request and made the following ruling:

> The Court finds that the State's interest outweighs the defendant's right of – to public scrutiny. The Court finds that exclusion of Jerry Williams from the courtroom during the testimony of the confidential informant is necessary to protect the confidential informant from intimidation that would traumatize him or render him unable to testify. This exclusion from the courtroom is temporary and only for the testimony of the confidential informant, and the Court finds that a reasonable alternative for Jerry Williams would be to watch the testimony in a live video stream feed from another room.

Id. at 7.

SUMMARY OF THE ARGUMENTS

The opinion of the Court of Appeals should be reversed. Generally, if the reviewing court finds that a courtroom closure is unjustified it is structural error and reversal is automatic. However, under the federal triviality doctrine, unjustified exclusions or closures that do not implicate the values of the right to a public trial do not constitute a violation of the Sixth Amendment and therefore, reversal is not required. This standard has been adopted by at least five federal circuit courts of appeals. This Court should also adopt this standard because doing so would bring Texas law back in line with current federal precedent. Additionally, adopting it would solve some of the problems caused by its current approach, which is too rigid and leads to absurd result just as it did in this case.

In the case at bar, Jerry Williams's exclusion from the courtroom during the confidential informant's testimony is too trivial to amount to a violation of the right to a public trial. His exclusion involved one person, was limited to one witness, and the live feed allowed him to see and hear the testimony just as if he had been in the courtroom.

Consequently, it does not implicate any of the values that underly the right to a public trial, which means that his exclusion is too trivial to constitute a violation of the Sixth Amendment.

Alternatively, the Court of Appeals's decision should be reversed because Jerry Williams's exclusion did not constitute a closure. The live feed allowed him to view the testimony just as if he had been sitting in the courtroom. Therefore, his exclusion had no impact on his ability to view the informant's testimony and was not a closure.

Finally, the Court of Appeals erred because its opinion does not clearly distinguish between full and partial closures. This Court should formally adopt the distinction. While a full closure requires an overriding governmental interest, a partial closure only requires a substantial interest. The need to protect the confidential informant from intimidation and trauma constituted such an interest. Therefore, the Court of Appeals opinion should be reversed.

ARGUMENTS AND AUTHORITIES

<u>Issue 1:</u> The Court of Appeals's approach to the right to a public trial is excessively rigid and leads to absurd results. This Court should adopt the federal triviality doctrine and apply it to the facts of this case. Under that doctrine, Jerry Williams's exclusion from the courtroom was too trivial to amount to a violation of the Sixth Amendment.

> *(1)(a) Under Texas's current interpretation of the right to a public trial, all violations of the right result in automatic reversal no matter how insignificant or trivial they are. Because such an approach is excessively rigid and leads to absurd results, this Court should adopt the federal triviality standard, which states that trivial closures do not violate the Sixth Amendment and therefore, do not require reversal. Adoption of this standard would also bring Texas law in line with current federal precedent.*

The Sixth Amendment guarantees the right to a public trial in criminal prosecutions. *Presley v. Georgia*, 558 U.S. 209, 212 (2010); *Lilly v. State,* 365 S.W.3d 321, 328 (Tex. Crim. App. 2012). The Texas Constitution also contains a right to public trial and that right is interpreted in the same manner as the Sixth Amendment's. *Woods v. State*, 383 S.W.3d 775 (Tex. App.—Houston[14th Dist.] 2012, pet. ref'd) (n.1).

Trials are presumed open, but the right is not absolute and may be outweighed by other competing rights or interests. *Waller v. Georgia*, 467 U.S. 39, 45 (1984); *Lilly*, 365 S.W.3d at 328. To rebut this presumption, (1) the party seeking closure must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. *Waller*, 467 U.S. at 48. This is sometimes known as the *Waller* test. *See Lilly*, 365 S.W.3d at 329.

A violation of this right is considered structural error and does not require a showing of harm. *Johnson v. United States*, 520 U.S. 461, 468-69 (1997); *Lilly*, 365 S.W.3d at 328. That means that if a court finds that the right has been violated, then reversal is automatic. *Woods*, 383 S.W.3d at 779. Under current Texas law, there is no exception to this rule. *See Lilly*, 365 S.W.3d at 328.The problem with this approach is that it means that any closure that does not pass the *Waller* test will always be reversed no matter how small, insignificant, inconsequential, or trivial it is.

Such a rigid approach cannot be what was contemplated when the right to a public trial was created. This is illustrated by the federal approach to interpreting the right, which is far less rigid than Texas's approach. In *Peterson v. Williams*, the Second Circuit created what is known as the triviality standard. *Peterson v. Williams*, 85 F.3d 39, 42-44 (2nd Cir. 1996). Under this standard, some unjustified closures are too trivial to amount to a violation of the Sixth Amendment. *Id.* at 42. Consequently, they do not result in an automatic reversal of the conviction.

In *Peterson*, the Second Circuit was asked to determine whether a trial court's temporary and inadvertent exclusion of the public during the defendant's testimony violated the Sixth Amendment right to a public trial. *Id.* at 41. The governmental moved to close the courtroom during the testimony of two undercover officers. *Id.* The trial court denied the motion with respect to the first officer and granted it with respect to the second. *Id.* After the second officer testified, the defendant took the stand. *Id.* Before closing argument, defense counsel discovered that the courtroom had remained closed during the defendant's testimony and moved for mistrial. *Id.* The trial court denied the

motion and found that the failure to reopen the courtroom after the second officer testified was the result of an administerial mistake. *Id.* It also found that the court was unaware of it until after the defendant had testified, that the court took steps to open the courtroom, and that there was no prejudice shown against the defendant because of the error. *Id.* at 41-42.

The Second Circuit affirmed the trial court's denial of the motion for mistrial. *Id.* at 44. It noted that the right to a public trial is not absolute and that some unjustified closures are "too trivial to amount to a violation of the amendment." *Id.* at 42. It then stated that:

> A triviality standard, properly understood, does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer "prejudice" or "specific injury." It is, in other words, very different from a harmless error inquiry. It looks, rather, to whether the actions of the court and the effect they had on the conduct of the trial deprived the defendant – whether otherwise innocent or guilty – of the protections conferred by the Sixth Amendment.

Id.

The triviality standard has been recognized by multiple federal circuit courts, including the Second, Third, Seventh, Ninth, and DC Circuit Court of Appeals. *United States v. Greene*, 431 F. Appx. 191, 195 (3rd Cir. 2011); *United States v. Perry*, 479 F.3d 885, 890 (D.C. Cir. 2007); *United States v. Ivester*, 316 F.3d 955, 959-60 (9th Cir. 2003); *Braun v. Powell*, 227 F.3d 908, 918-20 (7th Cir. 2000); *Peterson*, 85 F.3d at 42-44. Nothing in the Supreme Court's *Presley v. Georgia* decision overturns this doctrine and federal appellate courts have applied it post-*Precisely*. *United States v. Gupta*, 699 F.3d

682, 687-689 (2nd Cir. 2012)[3]; *Greene*, 431 F.Appx at 195-97; *See Presley*, 558 U.S. 209.

Under this standard, certain closures, even problematic ones, can be too trivial to constitute a violation of the Sixth Amendment's right to a public trial. *Perry*, 479 F.3d at 890. A trial court's failure to make particularized findings under *Waller* does not foreclose application of the standard. *See Carson v. Fisher*, 421 F.3d 83, 92 (2nd Cir. 2005)(finding that the exclusion of the defendant's ex-mother-in-law was too trivial to amount to a violation of the Sixth Amendment despite the fact that the trial court "made no particularized inquiry into whether Broome's exclusion was necessary to promote an overriding interest"). Instead, application of the doctrine focuses on the values that the right to a public trial is designed to protect. *Perry*, 479 F.3d at 890. A closure is trivial if it does not implicate the values served by the Sixth Amendment. *Id.*

Those values are (1) to ensure a fair trial, (2) remind the prosecutor and judge of their responsibility to the accused and importance of their functions, (3) to encourage witnesses to come forward, and (4) to discourage perjury. *Waller*, 467 U.S. at 46-47; *Peterson*, 85 F.3d at 43. Texas Courts have recognized the existence of these values as well. *Woods*, 383 S.W.3d at 782. In fact, the Court of Appeals recognized them in its own opinion. *Williams*, 2020 Tex. App. LEXIS 3982 at pg. 3.

Despite this recognition, Texas has not adopted the triviality standard. In the case at bar, the Court of Applies decided, with minimal analysis, that the exclusion of Jerry

[3] While *Gupta*'s trial occurred in 2008, the court's decision was issued in 2012. *Gupta*, 669 F.3d at 685. Additionally, the Court repeatedly cites to *Presley* throughout its opinion and gives no indication that it believes *Presley* had any impact on the triviality standard. *Id.* at 684-690.

Williams constituted a closure. *Id.* at 6. It then applied the *Waller* factors, found that they had not been met, and reversed appellant's conviction. *Id.* at 7-9. No consideration was given to the trivial nature of the Jerry Williams's exclusion. *See Id.*

This Court used a similar approach in its decisions in *Cameron v. State* and *Lilly v. State*. *Cameron v. State*, 490 S.W.3d 57, 62-64 (Tex. Crim. App. 2014); *Lilly*, 365 S.W.3d at 330-33. Thus, the Fourth Court's is consistent with the approach this Court took in *Cameron* and *Lilly*. In fact, the Court of Appeals was, in all likelihood, was bound to do so, which is the entire problem.

This means that Texas law does not track current federal law. As noted, at least five different federal circuit courts have adopted it. Furthermore, while Texas technically has its own body of case law regarding this right, that caselaw is largely derived from federal precedent. The extent of that reliance can be seen in various decisions issued by this Court and the courts of appeals. Many of these decisions cite to federal law or rely on Texas cases that cite to federal law. *See Lilly,* 365 S.W.3d at 327, 329 (citing to a significant number of U.S. Supreme Court cases); *See Darden v. State,* 2013 WL 782624, 2013 Tex. App. LEXIS 2070, pg. 3-4 (Tex. App. Texarkana 2013, pet. ref'd)(not designated for publication)(mem. op.)(citing to Supreme Court cases and this Court's decision in *Lilly v. State*) *See Woods*, 383 S.W.3d at 779, 781-82 (citing to both Supreme Court and federal circuit court decisions).

In fact, the Court of Appeals opinion is an example of this reliance as it sites to a significant number of federal cases. *Williams*, 2020 Tex. App. LEXIS 3982 at pg. 3-8. Despite the heavily the heavy reliance on federal law, it does not track current

developments within that body of law. Adopting the triviality standard would bring back into line with federal law.

Additionally, Texas's approach constitutes poor public policy because it creates fertile ground for absurd results. The reviewing court merely decides if there is a closure and whether that closure satisfies *Waller*. However, *Waller's* entire focus is on the reason behind the closure. Its significance and impact, or lack thereof, are not considered, which means that if someone is excluded for virtually any reason, then it's a closure and *Waller* is applied. It does not matter how unintentional, brief, or insignificant it is. *Waller* gives offers no leeway for these types of closures and the fact that *Waller's* focus is entirely on the reason for the closure means that those cases are the most likely to reversed because they are less likely have an overriding interest (or findings from the trial court). This is a problem because it those closures that are the least likely to implicate the values protected by the Sixth Amendment.

An obvious example of this problem are the circumstances in *Peterson*. It was indisputable that the courtroom was closed during the defendant's testimony and there was no justification for that closure. *See Peterson*, 85 F.3d at 41-42. Under a conventional application of *Waller,* there would be no overriding interest and the case would have been reversed despite its trivial nature. *See Id.* at 42. The conviction would have been reversed even though the closure was accidental, brief, and did not implicate the values that the right to a public trial was designed to protect.

Another notable example is the Seventh Circuit's decision in *Braun v. Powell*. In that case, the trial judge had a policy of prohibiting venire members who were not

selected for the jury from watching the trial. *Braun*, 227 F.3d at 910. This policy resulted in the exclusion of a venire member who had attempted to watch the trial after he had not been selected to sit on the jury. *Id.* at 910, 917. The Seventh Circuit found that although the exclusion was permanent, it did not implicate the policy concerns behind the right to a public trial and did not rise to the level of a Sixth Amendment violation. *Id.* at 919-20. Specifically, it noted that

> There is no reason to believe that Ms. Braun's trial was any less fair, or that the court officers or witnesses took their roles any less seriously, because of the exclusion of this one spectator. Indeed, the exclusion was implemented, albeit mistakenly from what appears in the record, by the trial court to avoid any prejudice to the defendant. Moreover, although the record gives no justification for such action on the part of the trial judge, it is difficult to see any basis for attributing any significant detriment to the integrity of the trial proceedings to it. Mane's presence or absence from the trial does not appear to have had any effect on encouraging witness to come forward or discourage perjury.

Id. at 919.

If the 7th Circuit applied the Court of Appeals approach, it would have been an automatic reversal. As a result, a six-week trial would have to be done over again because of the "exclusion of a sole individual without any connection to the case or the parties." *Id.* at 919-20. The Court of Appeals's approach, and Texas law in general, contains a blind spot because there is no method for addressing trivial or inconsequential closures.

Texas law effectively treats all closure as consequential regardless of their circumstances and regardless of whether reversing the case will do anything to further the purposes behind the right to a public trial. Thus, this excessively rigid approach is bound to lead to absurd results just as it did in this case and would have done so in both

Peterson and *Braun*. It results in needless reversals and waste resources with needless retrials.

The triviality standard is the federal court's answer to this problem. Trivial or inconsequential closures no longer result in needless reversals and wasteful retrials. Its focus on the values on the Sixth Amendment is meant to protect rather than the harm caused by the exclusion prevents it from running afoul its designation of structural error because no showing of harm is required. It also avoids the problem of requiring a defendant to engage in the near impossible task of having to prove harm. In short, adoption of this standard would bring Texas in line with current federal precedent and constitute a far sounder public policy than its current approach. Therefore, this Court should adopt this standard and apply it to the facts of this case.

> *(1)(b) Jerry Williams's exclusion from the courtroom during the informant's testimony did not implicate the values of the Sixth Amendment's right to a public trial because it only involved the exclusion of one person for a single witness and the live feed allowed him view the witnesses testimony as it was given. Therefore, it was too trivial to amount to a violation of the Sixth Amendment.*

The Fourth Court of Appeals reversed appellant's conviction because it found that the Jerry Williams's exclusion from the courtroom constituted an unjustified closure. *Williams*, 2020 Tex. App. LEXIS 3982 at pg. 5-9. The Court of Appeals's decision should be reversed because Jerry Williams's exclusion was too trivial to constitute a violation of the Sixth Amendment right to a public trial. A closure is too trivial to constitute a violation of the Sixth Amendment if it does not implicate the values the right to a public trial is designed to protect. *Perry*, 479 F.3d at 890. Those values are (1) to

ensure a fair trial, (2) remind the prosecutor and judge of their responsibility to the accused and important of their functions, (3) to encourage witnesses to come forward, and (4) to discourage perjury. *Waller*, 467 U.S. at 46-47; *Peterson*, 85 F.3d at 43; *Woods*, 383 S.W.3d at 782.

The trial court excluded Jerry Williams from the courtroom during the confidential informant's testimony. No one else was excluded and that exclusion was only for that witness. In addition, Jerry Williams was able to watch the informant give their testimony in real time via a live feed from another room. The only difference between a fully open courtroom room and what occurred in this case is the place Jerry Williams sat when he saw the informant's testimony. He was able to see and hear it just as he would have had he been sitting in the courtroom.

Nothing in the record suggests the fairness of appellant's trial hinged on the specific location Jerry Williams's sat when he watched the informant's testimony. Not only did the courtroom remain open to literally anyone else who wanted to be there, but Jerry Williams was able to view the testimony at the time it was given. Courts have cited the ability to learn of a witness's testimony from other witnesses or closing argument as a reason for finding that an exclusion or closure was trivial. *See Carson*, 421 F.3d at 93 ("counsel on both sides discussed Sanchez's testimony in their summation…thus, even if Broome was excluded from Sanchez's actual testimony, and even if his testimony was important, Broome still had an opportunity to hear much of the substance"); *See Peterson*, 85 F.3d at 43-44 ("but the repetition, in the summation, of the defendant's brief

testimony could well have served to give notice to some potential corroborating witness").

Jerry Williams was in a superior position to these individuals. He did not have to hear about the informant's from other witnesses or closing arguments. The live feed allowed him to see and hear it in full at the time it was given.

Second, the arraignment was sufficient to keep the prosecutor and trial court cognizant of their responsibilities to appellant and the importance of their functions. Other than Jerry Williams's exclusion during the informant's testimony, the courtroom was open to everyone else for the entire trial. Moreover, both the prosecutor and trial court were aware of the live feed and knew he was watching them while the informant was on the stand. It defies common sense to believe that they would suddenly disregard their duties and responsibilities based on the location of a single spectator, especially when they knew he was still watching them via the live feed.

There is also no reason to believe that his physical presence in the courtroom would have encouraged any witnesses to come forward or that the informant was more likely to perjure themselves because he was watching from another room. The courtroom was open to literally everyone else for the entirety of the trial and to Jerry Williams for all of it except the informant's testimony. Even if Jerry Williams were somehow important to either function, his ability to view the testimony as it was given (and the knowledge that this set up existed), would have made it easy for him to discover and notify court personnel or counsel of any issues or a need to testify.

The impact of the trial court's order was to change the location where Jerry Williams saw and heard the informant's testimony. Otherwise, got to see and hear it at the exact same time as everyone else and just the same as if he had been sitting in the courtroom. The Court of Appeals's approach implicitly suggests that this difference was significant when neither the evidence nor common sense indicate that it is. A reversal under these circumstances cannot be what was contemplated when the right to a public trial was created. It does nothing further the right and is an elevation of form over substance.

Cases like this are why federal courts created the triviality standard. Thus, to the extent that Jerry Williams's exclusion constitutes an unjustified closure, it is an incredibly trivial one and does not violate the Sixth Amendment right to a public trial. Thus, the Court of Appeals's decision should be reversed.

Issue 2: Jerry Williams's exclusion did not constitute a closure or the courtroom because the live feed allowed him to see and view the informant's testimony at the time it was given and, thus, see and hear it just as if he had been inside the courtroom when the informant testified.

Under the traditional *Waller* analysis, the reviewing court asks two questions: (1) was the trial closed, and if so, (2) was that closure proper. *Lilly*, 365 S.W.3d at 329. Whether a particular defendant's trial was closed to the public should be ascertained on a case-by-case basis after considering the totality of the evidence. *Cameron*, 490 S.W.3d at 62; *Lilly*, 365 S.W.3d. at 330.

In its brief for the Court of Appeals, appellee argued that having Jerry Williams view the informant's testimony through a live feed in another room did not constitute a

closure. *Appellee's Brief Before the Court of Appeals*, pg. 10-11. Unfortunately, the Court of Appeals did not address this argument in its opinion. *Williams*, 2020 Tex. App. LEXIS 3982 at pg. 6. It merely stated that Jerry Williams was excluded and therefore, the courtroom was partially closed. *Id.* However, its failure to address this argument is not the only problem with its opinion on this issue.

By finding that a closure occurred under the facts of this case, the Court of Appeals implicitly suggested that his physical presence was required without ever providing an explanation as to why. This is not ascertaining whether a closure exists on a case by case after considering the totality of the evidence. No consideration was given to the accommodation used by the trial court nor was any reason provided as to why it constituted a closure despite the fact that his ability to see and hear the informant's testimony remained unchanged.

In a typical courtroom closure, people (or sometimes the entire public) are excluded from viewing from the proceedings. *See Cameron*, 490 S.W.3d at 62; *See Steadman v. State*, 409 S.W.3d 499, 500-502 (Tex. Crim. App. 2012); *See Woods*, 383 S.W.3d at 780-81.When people are excluded from the courtroom they cannot see or hear what is occurring at the time it occurs. At best, they reduced to hearing second-hand accounts by those that remained (if any did) or through summations (if the closure was temporary or did not involve voir dire). Such scenarios are rightfully deemed closures because people are excluded in a way that prevents from hearing and viewing portions of the trial. These situations clearly increase the risk of undermining the right to a public trial. However, that risk does not exist in this case.

Jerry Williams was the only person who had to leave the courtroom, that exclusion was limited to the testimony of one witness, and the live feed allowed him to see and hear the informant's testimony as it was given. In other words, unlike typical exclusions, he did not have to depend on other sources to find out what happened. He saw it himself. The only difference was where he sat when he saw the testimony.

However, the Court of Appeals's finding implies that his physical presence was somehow determinative despite little meaningful difference between the two situations. In fact, it goes further than just implying that physical presence, in general, is important. It suggests that the physical presence of Jerry Williams, personally, was determinative, even though the courtroom remained open to all other spectators and he still got to see the testimony as it was given. Nothing in record supports this implication and it is difficult to see how such an arraignment undermines the right to a public trial or any of its values.

It constitutes a closure in only the most literal and rigid sense of the term. It treats all exclusion as closures regardless of the circumstances when cases like this demonstrate that this is not the case. Cases end up needlessly reversed, and resources are wasted retrying them without doing anything to further to the right or serve the purposes for which it exists. In sum, based on the totality of the circumstances, the exclusion of Jerry Williams does not constate a closure and the Court of Appeal's decision should be reversed.

<u>Issue 3:</u> Partial closures do not raise the same constitutional concerns as full closures because people remain in the courtroom to protect the right to a public trial and this Court should formally recognize that distinction. The closure in this case constituted a partial closure and was supported by a substantial basis.

At least one Texas court and several federal courts have recognized a distinction between full and partial closures. *Woods*, 383 S.W.3d at 782; *United States v. Osborne*, 68 F.3d 94, 98-99 (5th Cir. 1995); *United States v. Farmer*, 32 F.3d 369, 371 (8th Cir. 1994); *United States v. Kuhlmann*, 977 F.2d 74, 76 (2nd Cir. 1989); *United States v. Sherlock*, 96 F.2d 1349, 1357 (9th Cir. 1989); *Neito v. Sullivan*, 879 F.2d 743, 753 (10th Cir. 1989). A partial closure occurs when only a specific person or group of people is excluded from the courtroom. *Woods*, 383 S.W.3d at 781.

While a trial court needs an overriding governmental interest to justify a full closure, it only needs a substantial interest to justify a partial closure. *Woods*, 383 S.W.3d at 782; *Osborne*, 68 F.3d at 98-99; *Farmer*, 32 F.3d at 371; *Kuhlmann*, 977 F.2d at 76; *Sherlock*, 96 F.2d at 1357; *Neito*, 879 F.2d at 753. The need to protect a witness from retaliation or emotional harm can justify temporarily excluding a specific person or group from the courtroom during that witness's testimony. *Woods*, 383 S.W.3d at 782; *Osborne*, 68 F.3d at 99; *Farmer*, 32 F.3d at 371; *Kuhlmann*, 977 F.2d at 76; *Sherlock*, 96 F.2d at 1357; *Neito*, 879 F.2d at 753.

The Court of Appeals makes no explicit distinction between partial and total closures in its opinion. When describing the test for when a courtroom closure is justified, it describes the substantial basis test that is used for partial closures. *Williams*, 2020 Tex. App. LEXIS 3982 at pg. 4. However, it does not mention that this is the standard used for

such closures and does not mention *Waller*'s overriding interest standard at all. *Id.* at 3-4. It also never acknowledges that there are different types of closures nor does it note that difference standards apply to each. *Id.* at 3-5. It refers to Jerry Williams's exclusion as a partial closure, but the Court's approach makes it unclear whether it believes the partial nature of its closure is significant or has any effect on its analysis.

The problem is that decisions such as the Fourteenth Court's decisions in *Woods v. State*, make it clear that there is a difference between them and that partial closures must meet a lesser burden than full closures. *Woods*, 383 S.W.3d at 782. The Court of Appeals's failure to mention *Waller*'s overriding interest tests makes it unclear whether it meant to apply the substantial basis standard used for partial closures in only those types of cases or for all courtroom closures. This lack of clarity risks sowing confusion for other courts as to whether there are different standards for each and the circumstances in which they should be applied.

In making the distinction between full and partial closures, the *Woods* court relied on existing federal precedent and noted that the difference with partial closures is that despite the closure, some people remain in the courtroom to protect the right to a public trial. *Id.* Clear recognition of this concept is important because it is a recognition of the idea that not all closures are the same and should not be treated as such. As noted above, the core weakness of Texas's current approach to the right to a public trial is its propensity to treat all exclusions and closures as if they are the same when that they are not.

However, to be clear, while appellee believes recognition of the distinction between full and partial closures is a necessary step to solving that problem, it is not a sufficient one. Adoption of the principles stated in Parts 1 and 2 are still necessary in order to allow Texas courts to adequately deal with the various type of exclusions and/or closures that exist.

That said, the State had a substantial basis for excluding Jerry Williams from the courtroom during the informant's testimony. The State sought to exclude Jerry Williams because it had "credible and reliable information that it would be very intimidating to our witness for him to be in the courtroom to testify." (RR Vol. 3, pg. 5). Despite the Court of Appeals's assertion that the trial court's findings do not explain how Jerry Williams's exclusion serves the State's interest, the trial court found that this exclusion was necessary to protect the informant from intimidation and trauma. That reason has been used to justify a partial closure in other cases. *See Woods*, 383 S.W.3d at 782; *See Osborne*, 68 F.3d at 99; *See Farmer*, 32 F.3d at 371; *See Kuhlmann*, 977 F.2d at 76; *See Sherlock*, 96 F.2d at 1357; *See Neito*, 879 F.2d at 753

As the prosecutor stated, being a confidential informant is an inherently dangerous activity that can and has resulted in serious injury or death in those who have engaged in it. (RR Vol. 3, pg. 6-7). Such activity invariably involves the informant violating the trust of a defendant by providing evidence against them and the trial court was reasonable in accepting the prosecutions representations that the informant was intimidated by Jerry Williams. Therefore, the Court properly found that a substantial basis existed for his exclusion. Additionally, the closure was no broader than necessary as it was limited to the

person who intimidated the witness and was limited to that witness's testimony. Moreover, that person was still able to view the informant give their testimony via the live feed.

Although the trial court did not explicitly consider alternatives, this is inconsequential. There were no reasonable alternatives as the only choices were to exclude Jerry Williams or remove the witness. That would just be trading one constitutional problem (right to a public trial) for another (confrontation). In sum, therefore, the trial court properly found that a substantial basis existed for Jerry Williams's exclusion from the courtroom and the Court of Appeals's decision should be reversed.

CONCLUSION AND PRAYER

WHEREFORE, appellee respectfully prays that this Honorable Court reverse the Court of Appeals's decision and affirm appellant's conviction.

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CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that a true and correct copy of this document was served by email to appellant's attorney via lamersonlawfirm@gmail.com and the State Prosecutor's Office at stacey.soule@spa.texas.gov on the 20th Day of October, 2020.

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/s/Christopher M. Eaton
Christopher M. Eaton

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